No. 15-290

In the Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES COMPANY, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMERICAN FARM BUREAU FEDERATION, AMERICAN PETROLEUM INSTITUTE, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, AND NATIONAL MINING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

MICHAEL B. KIMBERLY
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

TIMOTHY S. BISHOP
Counsel of Record
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60603
(312) 781-0600
tbishop@mayerbrown.com

Counsel for Amici Curiae
(additional counsel listed on signature page)

TABLE OF CONTENTS

Table of Authorities ii
Interests of the *Amici Curiae* 1
Introduction and Summary of Argument 4
Argument 6
A. Fundamental fairness requires that landowners have an adequate and timely means to challenge final CWA jurisdictional determinations 6
B. Regulated entities have no adequate method of challenging jurisdictional determinations other than APA § 704 12
1. Whether alternative avenues of review are "adequate" is a practical inquiry 12
2. The practical consequences of an adverse jurisdictional determination make any alternative mode of review inadequate 16
3. Judicial review of jurisdictional determinations will conserve party and agency resources and further the development of the law 23
Conclusion 25

TABLE OF AUTHORITIES

Cases

Bennett v. *Spear*,
520 U.S. 154 (1997) 7

Borden Ranch P'ship v. *U.S. Army Corps of Eng'rs*,
261 F.3d 810 (9th Cir. 2001) 22

Borden Ranch P'ship v. *U.S. Army Corps of Eng'rs*,
537 U.S. 99 (2002) 22

Cent. Hudson Gas & Elec. Corp. v. *EPA*,
587 F.2d 549 (2d Cir. 1978) 15

Fairbanks N. Star Borough v. *U.S. Army Corps of Eng'rs*,
543 F.3d 586 (9th Cir. 2008) 24

FERC v. *Mississippi*,
456 U.S. 742 (1982) 19

Fort Sumter Tours, Inc. v. *Andrus*,
564 F.2d 1119 (4th Cir. 1977) 15

Free Enter. Fund v. *Pub. Co. Accounting Oversight Bd.*,
561 U.S. 477 (2010) 15

Gardner v. *Toilet Goods Association*,
387 U.S. 167 (1967) 14

Mathews v. *Eldridge*,
424 U.S. 319 (1976) 7

Nat'l Automatic Laundry & Cleaning Council v. *Shultz*,
443 F.2d 689 (D.C. Cir. 1971) 15

Cases—continued

Rapanos v. *United States*,
547 U.S. 715 (2006) 8, 9, 11, 21

Sackett v. *EPA*,
132 S. Ct. 1367 (2012) 10, 13, 14, 20

Solid Waste Agency of Northern Cook County v. *U.S. Army Corps of Eng'rs*,
531 U.S. 159 (2001) 8, 17, 18, 19

United States v. *Board of Trs.*,
531 F. Supp. 267 (S.D. Fla. 1981) 4

United States v. *Riverside Bayview Homes, Inc.*,
474 U.S. 121 (1985) 8

United States v. *Sargent City Water Res. Dist.*,
876 F. Supp. 1081 (D.N.D. 1992) 4

Wadley S. Ry. Co. v. *Georgia*,
235 U.S. 651 (1915) 15

Statutes and regulations

5 U.S.C. § 704 ..... 6, 12, 14

33 U.S.C.
§ 1319(c)(1) 5
§ 1319(c)(2) 5, 10, 22
§ 1319(d) 9
§ 1341 18
§ 1362(7) 7

33 C.F.R.
§ 320.1(a)(6) 7
§ 320.4(a) 18
§ 320.4(a)(1) 18
§ 320.4(a)(2)(i) 19
§ 320.4(d) 18

Statutes and regulations—continued

40 C.F.R. § 230.93(a)(1) 11

58 Fed. Reg. 45,008 (Aug. 25, 1993) 21

80 Fed. Reg. 37,054 (June 29, 2015) 21

Other Authorities

David Sunding and David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59 (2002) 11

Envtl. Protection Agency & U.S. Army Corps of Eng'rs, *Economic Analysis of Proposed Revised Definition of Waters of the United States* (Mar. 2014), perma.cc/434R-4XFA 11

John E. Reynolds & Alex Regalado, *The Effects of Wetlands and Other Factors on Rural Land Values*, APPRAISAL J., April 2002 12

Thomas W. Merrill, *The Story of SWANCC*, in ENVIRONMENTAL LAW STORIES 283 (Richard Lazarus ed., 2005) 17

U.S. Army Corps of Eng'rs, Regulatory Guidance Letter No. 08-02, Jurisdictional Determinations (June 26, 2008), perma.cc/6ASN-PPLF 7

INTERESTS OF THE *AMICI CURIAE*[*]

Amici curiae represent a broad cross-section of the Nation's farming, ranching, energy, mining, construction, and manufacturing sectors.

The *American Farm Bureau Federation* (AFBF), a not-for-profit, voluntary general farm organization, was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing about 6 million member families.

The *American Petroleum Institute* is a nationwide, non-profit trade association that represents over 650 companies involved in all aspects of the petroleum and natural gas industry, from the largest integrated companies to the smallest independent oil and gas producers.

The *Associated General Contractors of America* (AGC) is the leading trade association in the construction industry, representing more than 26,000 firms engaged in building, heavy, civil, industrial, utility and other construction for both public and private property owners and developers. AGC and its nationwide network of 92 chapters have sought to improve and advance the interests of the construction industry for nearly a century.

---

[*] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Both parties' blanket consents to the filing of *amicus curiae* briefs have been filed with the Clerk's office.

The *National Association of Manufacturers* (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for three-quarters of private-sector research and development. The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The *National Cattlemen's Beef Association* (NCBA) is the national trade association representing U.S. cattle producers, with more than 30,000 individual members and several industry organization members. NCBA represents more than 175,000 of America's farmers, ranchers and cattlemen who provide a significant portion of the nation's supply of food. NCBA works to advance the economic, political, and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests.

The *National Mining Association* is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries.

Amici have a profound interest in the outcome of this case because their members own, lease, improve, and conduct their operations on real property. Any

determination that such property contains jurisdictional "waters of the United States" significantly impacts how the land may be used and dramatically raises the cost, and often reduces the feasibility, of constructing critical infrastructure. Operations and improvements that are perfectly lawful on property that does not contain jurisdictional waters become subject to severe criminal and civil penalties and a potential target of third party litigation if jurisdictional waters are disturbed without a Clean Water Act permit.

It is therefore essential that *amici's* members know with certainty whether their property contains jurisdictional waters. But the precise scope of the Clean Water Act, and the land to which it applies, depend on statutory terms that agencies and courts have found difficult to interpret. The resulting uncertainty over the scope of the CWA has unfairly exposed *amici's* members to the risk of civil and criminal liability under the Act. The federal government's broad jurisdictional theory sweeps millions of landowners and operators into the agencies' jurisdiction. The regulated community must be afforded a way to respond, at a definitive but still early point in the process, to overly aggressive jurisdictional determinations.

A jurisdictional determination from the U.S. Army Corps of Engineers is *that agency's* final conclusion as to whether and what jurisdictional waters are present on the land—a conclusion that may be highly contestable in a particular case. Given the great legal and factual uncertainty about what features constitute jurisdictional waters under the CWA, and the cost, delay and disruption involved in seeking a permit, it is of immense importance to

amici and their members that Corps' jurisdictional determinations can immediately be challenged in court. The economic and social costs of delaying review, and the lack of alternative avenues of timely relief, mean that jurisdictional determinations should be subject to immediate judicial review under APA Section 704.

INTRODUCTION AND SUMMARY OF ARGUMENT

Whether or not a parcel of land contains "waters of the United States" that are subject to federal regulatory jurisdiction under the Clean Water Act is a question of great practical importance to those who own, use or improve the land. When land is found to be jurisdictional, a host of regulatory obligations are triggered, including the requirement to obtain a "Section 404" permit from the U.S. Army Corps of Engineers before discharging any dredged or fill material into those jurisdictional waters—terms that have been broadly construed by the Corps to prohibit any productive use, improvement, alteration, or repair of property without first obtaining a permit. Using the land without a permit risks draconian criminal and civil penalties in government enforcement actions, or private enforcement litigation from environmental or neighborhood activists.[1]

---

[1] Liability under the CWA's civil enforcement provisions is strict; there is no requirement of negligence, much less of *mens rea*. See, *e.g.*, *United States* v. *Sargent City Water Res. Dist.*, 876 F. Supp. 1081, 1088 (D.N.D. 1992) (civil enforcement action against county, contractor, and engineer for performing or having "responsibility for or control over" drainage repair project); *United States* v. *Board of Trs.*, 531 F. Supp. 267, 274 (S.D. Fla. 1981) (civil enforcement action against community college board of trustees and contractor for stormwater drainage

The Corps has established a process by which landowners or operators can obtain an official "jurisdictional determination" of whether a particular land or water feature falls within federal jurisdiction under the CWA. Jurisdictional determinations made by the Corps convey the government's final and conclusive assessment of the jurisdictional issue; they are binding on the Corps and may be relied on by regulated entities for five years. The government contends, nevertheless, that these jurisdictional determinations are not subject to judicial review because they are not "final agency action" and because parties aggrieved by such determinations can obtain "adequate" judicial review of the jurisdictional issue at a later time.

This Court should reject both of those assertions. Jurisdictional determinations give rise to substantial legal consequences for landowners and operators: they announce a formal government determination of CWA jurisdiction, they expose owners and operators to drastic criminal and civil liabilities under the CWA, and they effectively force owners and operators into the costly and time-consuming permit process. Such consequences are the hallmark of "final agency action."

---

project; civil liability is "strict"). Landowners and operators who discharge dredged or fill material without a permit may incur substantial civil penalties, including civil fines of up to $37,500 per violation per day. Pet. Br. 9 n.4. Negligent violations of the Act carry prison terms of up to one year. 33 U.S.C. § 1319(c)(1). Penalties increase for multiple negligent violations, see *id.*, and for "[k]nowing" violations, to include fines of up to $100,000 per day and six years' imprisonment. 33 U.S.C. § 1319(c)(2).

In light of these weighty consequences, no alternative to immediate judicial review is "adequate." Adequacy in this context depends upon practical considerations—and it is decidedly impractical to require a landowner and operators to jump through the gold-plated hoops necessary to obtain a CWA permit that they believe the law does not require, or alternatively to flout the Corps' jurisdictional determination by proceeding with land-use plans or improvements and waiting to be sued, risking massive criminal and civil penalties. For a landowner or operator faced with an adverse jurisdictional determination, therefore, the only "adequate remedy in a court" is immediate review of the jurisdictional determination itself.

ARGUMENT

The Administrative Procedure Act authorizes judicial review of any "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Jurisdictional determinations unquestionably fit that description. As respondents explain in their brief (at pp. 18-39), jurisdictional determinations are "final" agency actions within the meaning of the APA. They also have immediate and severe consequences for landowners and operators. These significant consequences mean that anything short of prompt judicial review is inadequate to protect landowners' rights.

A. Fundamental fairness requires that landowners have an adequate and timely means to challenge final CWA jurisdictional determinations

Fundamental fairness, as this Court has said time and again, requires giving a party aggrieved by

government action the "opportunity to be heard at a meaningful time." *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (quotation marks omitted). For individuals or businesses that receive a jurisdictional determination from the Corps finding that their land is subject to federal jurisdiction under the Clean Water Act, the only "meaningful time" for judicial review is *right away*. The significant practical consequences of an adverse jurisdictional determination make the notion of delayed judicial review intolerable.

Jurisdictional determinations "alter the legal regime to which" a landowner or operator "is subject." See *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997). To begin with, jurisdictional determinations announce the government's conclusive assessment of whether particular land- and water-features qualify as "waters of the United States" within the meaning of 33 U.S.C. § 1362(7). A jurisdictional determination is, in other words, "an official Corps determination" as to whether waters of the United States are "present or absent" and "precisely identifies the limits of those waters." U.S. Army Corps of Eng'rs, Regulatory Guidance Letter No. 08-02, Jurisdictional Determinations, at 1 (June 26, 2008), perma.cc/6ASN-PPLF. Such a determination may be relied upon by regulated parties for up to five years, and a landowner can use a negative determination as a defense to a citizen suit under the CWA. *Id.* at 2. For landowners, a new jurisdictional determination is a restriction on activities that would otherwise be lawful.

It is not surprising, therefore, that the Corps' own regulations refer to a jurisdictional determinations as a "final agency action." 33 C.F.R.

§ 320.1(a)(6). Far from simply providing informal guidance on the question of jurisdiction, such determinations set out a formal, binding government position that the agency is unlikely ever to change. Landowners and operators have a limited right to an administrative appeal (see *id.* pt. 331), but once any administrative appeal is exhausted, they have no further recourse except to seek review of the determination in court.

The United States denies that jurisdictional determinations are significant, contending that "[t]he CWA itself, not [a] jurisdictional determination," is what imposes legal obligations on a landowner or operator. Pet. Br. 27. In the government's view, jurisdictional determinations are ministerial actions in which the Corps simply puts a formal stamp on a result that the CWA clearly ordains in its own right.

That is not even close to the truth. The meaning of the "navigable waters" that are the "waters of the United States" remains subject to debate even after three rulings of this Court addressing those terms.[2] EPA's and the Corps' latest effort to define these statutory concepts—in a rule currently stayed by judicial order—is so vague and expansive that it has been challenged by a majority of the States, every national business group with an interest in land use, and a host of environmental organizations. See p.21 n.8, *infra*.

Without question, the Corps exercises considerable discretion every time it makes a jurisdictional

---

[2] See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Rapanos* v. *United States*, 547 U.S. 715 (2006).

determination because, as this Court has recognized, "'the definitions [the Corps] use[s] to make jurisdictional determinations' are deliberately left 'vague.'" *Rapanos*, 547 U.S. at 727 (plurality opinion). Thus, the Corps asserts broad discretion to flesh out how vaguely-defined regulatory concepts apply in specific cases. In exercising that discretion, the Corps not only identifies the physical boundaries of CWA jurisdiction, but it shapes the legal limits of its discretion, case by case. The Corps' jurisdictional determinations create new legal encumbrances on land where none existed before, and they often test the boundaries of federal authority under the CWA.

In this way, jurisdictional determinations immediately alter the legal position of the regulated parties who receive them. To begin with, the jurisdictional determination authoritatively resolves an issue (whether the government considers the property to contain "waters of the United States") that before was uncertain and that is guided only by vague agency rules and other edicts, the application of which is often highly contestable in specific cases. The Corps' official determination thus makes concrete what before could only be guessed at by the landowner or operator.

In addition, the Corps' determination puts the landowner or operator on notice that the land contains "waters of the United States" subject to the CWA and to Corps and EPA regulation, and where those waters are located. That notice affects the penalties for using or developing the land without first seeking a permit. Courts must take a defendant's "good-faith" into account when determining the amount of a civil penalty (33 U.S.C. § 1319(d)), and the government would surely argue that a

landowner or operator who proceeded with development in the face of an adverse jurisdictional determination lacked good faith. The government could also contend that the violation of the CWA was "knowing," a charge that exposes the landowner or operator to increased fines and a lengthy jail sentence. *Id.* § 1319(c)(2); see p.4 n.1, *supra*.

It is no answer to say, as the government does (Pet. Br. 32), that a jurisdictional determination is merely evidence, and that its "evidentiary weight in [a] future proceeding" is "contingent" rather than "concrete." The Court made clear in *Sackett* that an agency action need not "impose a self-executing sanction" on a party in order for its consequences to be significant. *Sackett* v. *EPA*, 132 S. Ct. 1367, 1373 (2012). There, the CWA compliance order at issue did not directly impose sanctions on the landowners; it only increased the "*potential* liability" they faced, if and when EPA chose to "drop the hammer" and bring an enforcement proceeding. *Id.* at 1372 (emphasis added). Yet this Court held unanimously that this increased exposure was a legal consequence warranting immediate review. The same is true here.[3]

---

[3] The government asserts that the prospect that a formal jurisdictional determination will increase the penalties assessed upon a landowner "does not distinguish it" from an "informal" agency statement or "a private consultant's report," both of which could also be "offered as evidence" in support of increased penalties. Pet. Br. 32-33. That comparison does not hold water. Although a private report or informal agency guidance might well serve as evidence that a landowner acted "knowingly" or without good faith, neither is nearly as probative on that issue as a jurisdictional determination by the Corps—an official agency pronouncement of jurisdiction, rendered after a detailed review and likely tested in the crucible of an administrative appeal.

Furthermore, as we explain in greater detail below (Part B.2, *infra*), the increased risk of criminal or civil liability after an adverse jurisdictional determination means that making productive use of or improvements to the land without a permit is utterly unrealistic. The true consequence of an adverse determination is that the landowner or operator *must* apply for and obtain a permit in order to use or develop the land. That is no trivial matter. As this Court itself has observed, the permitting process imposes massive burdens, requiring months and often years to complete, at a cost of tens or hundreds of thousands of dollars—"not counting costs of mitigation or design changes." *Rapanos*, 547 U.S. at 721 (citing David Sunding and David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 74-76 (2002)).[4]

The prospect of dealing with CWA permitting is often enough to sink a development project altogether (including by making project financing impossible to obtain). Indeed, landowners and operators often abandon efforts to obtain a permit (or permit denial) because initial consultation with the

---

[4] CWA permittees are often required to take action to "offset environmental losses resulting from unavoidable impacts to waters of the United States." 40 C.F.R. § 230.93(a)(1). The Corps estimates the cost of mitigation at between $25,000 and nearly $50,000 *per acre* for wetlands covered by the CWA. See Envtl. Protection Agency & U.S. Army Corps of Eng'rs, *Economic Analysis of Proposed Revised Definition of Waters of the United States*, at 17 (Mar. 2014), perma.cc/434R-4XFA. In our experience, when no mitigation bank is available, per acre costs are considerably higher than that.

Corps leads them to conclude that no permit—or no economically feasible permit—will be issued and that the expense of a permit application will be wasted. Predictably, the burdens of permitting mean that property with designated wetlands is less valuable. See John E. Reynolds & Alex Regalado, *The Effects of Wetlands and Other Factors on Rural Land Values*, APPRAISAL J., April 2002, at 190 (the presence of wetlands has a "significant negative impact on rural land prices").

In short, an adverse jurisdictional determination has an immediate and serious impact on a landowner or operator. It binds regulators to an official position that the property is subject to CWA jurisdiction, leaving owners and operators with limited options. They cannot engage in any activities on the land that might result in a discharge to jurisdictional waters, without risking CWA penalties, unless they first undertake a slow, uncertain, and expensive permitting process—even when they have grounds to believe a permit is legally unnecessary. The principles of fundamental fairness embodied by Section 704 of the APA do not permit the government to put landowners and operators in a legal straitjacket like that, without the option of immediate judicial review.

B. Regulated entities have no adequate method of challenging jurisdictional determinations other than APA § 704

1. Whether alternative avenues of review are "adequate" is a practical inquiry

The burdens that follow from an adverse jurisdictional determination do more than show that the determination is a "final" agency action; they also demonstrate that landowners and operators have no

"adequate" alternative to immediate APA review. The government disagrees, insisting that regulated parties have "adequate alternative opportunities to argue in court that their property does not contain CWA-protected waters" because they can either (a) seek a Clean Water Act permit and then obtain judicial review after the Corps renders a decision on the permit or (b) use their land without a permit and raise the issue of jurisdiction in a subsequent enforcement proceeding. Pet. Br. 45. Those alternative means of obtaining judicial review of the antecedent jurisdictional determination are "adequate," in the government's view, irrespective of whether they are actually feasible.

The government is wrong. As *Sackett* makes clear, the bare existence of alternate avenues of judicial review does not mean that those alternatives are "adequate." To satisfy that statutory standard, alternative avenues of review must be practical, not merely theoretical—they must in fact be capable of granting meaningful relief.

In *Sackett*, the petitioners could have obtained judicial review of whether their property contained "waters of the United States" by starting construction of their house and waiting for EPA to bring an enforcement action against them. But the Court held that this was not an adequate avenue for judicial review because of the practical hardship that would result. As the Court pointed out, the Sacketts could not initiate the enforcement process themselves, and they risked incurring massive additional fines and penalties each day they waited for EPA to act. 132 S.

Ct. at 1372.[5] Thus, as the court of appeals correctly observed in this case, an alternative remedy cannot be considered adequate if requiring parties to rely on the alternative would leave them "unable, *as a practical matter*, to challenge [an agency's] assertions." Pet. App. 15a (emphasis added).

This focus on whether alternative routes to judicial review are practical and meaningful accords with the way the Court has addressed the adequacy of judicial review in other contexts. In *Gardner* v. *Toilet Goods Association*, 387 U.S. 167 (1967), for example, the Court looked to practicalities in evaluating whether pre-enforcement review of certain cosmetics regulations was appropriate under the ripeness doctrine. Requiring the regulated parties to violate the regulations and raise their legal challenges as a defense in a later enforcement proceeding was an "inadequate * * * alternative," the Court reasoned, because it was "beset with penalties and other impediments." *Id.* at 172. What is more, requiring the regulated parties to submit their products for premarket clearance was unacceptable because the resulting costs of testing and recordkeeping would be "substantial" and cause the parties "irreparable injury." *Id.* at 173 (quotation marks omitted). In light of those dire practical consequences, this Court concluded that immediate judicial review was appropriate under the ripeness doctrine. *Id.* at 174.

---

[5] The Court in *Sackett* observed that, in that case, the government, "to its credit, [did] not seriously contend that other available remedies alone foreclose review under § 704." 132 S. Ct. at 1372. The government does not persuasively explain why the possibility of later judicial review is any more meaningful here than it was in *Sackett*.

In fact, given the clear analytical overlap between the two legal tests, several courts of appeals expressly treat the question of "hardship" for purposes of the ripeness doctrine and "adequacy" under the APA as fungible inquiries. See, *e.g.*, *Cent. Hudson Gas & Elec. Corp.* v. *U.S. EPA*, 587 F.2d 549, 559 (2d Cir. 1978); *Fort Sumter Tours, Inc.* v. *Andrus*, 564 F.2d 1119, 1123 (4th Cir. 1977) (applying ripeness criteria to analyze reviewability under the APA). That makes sense, because "[t]he granting of prompt court consideration on the basis of hardship is obviously supported by the APA's provision for review of final agency action for which there is no other adequate remedy in a court." *Nat'l Automatic Laundry & Cleaning Council* v. *Shultz*, 443 F.2d 689, 696 (D.C. Cir. 1971).

A practical approach to the adequacy question under the APA finds further support in this Court's *Ex parte Young* doctrine. In that context, the Court has admonished that courts "normally do not require plaintiffs to bet the farm * * * by taking the violative action before testing the validity of the law," because that is not "a meaningful avenue of relief." *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010) (citations and quotation marks omitted). Yet that is precisely what declining APA review of jurisdictional determinations requires of landowners and business operators: betting the farm—sometimes literally—by taking a violative action before testing the validity of the determination. Judicial review under such circumstances is "illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." *Wadley S. Ry. Co.* v. *Georgia*, 235

U.S. 651, 661 (1915). That describes the situation here exactly.

The consistent principle underlying this Court's precedents is that alternate avenues of judicial review are *not* adequate when they impose substantial practical costs and other obstacles to meaningful relief. There is no reason why the rule should be any different in the APA context.

2. The practical consequences of an adverse jurisdictional determination make any alternative mode of review inadequate

The two alternatives to immediate review of a jurisdictional determination that the government relies upon—seek a CWA permit and then litigate the Corps' jurisdiction to make the permit decision, or use the land without a permit and litigate jurisdiction in the enforcement proceeding that follows—are ones that only a bureaucrat would find satisfactory. To landowners and business operators like *amici's* members, they are so impractical as to be largely meaningless.

a. The government suggests that a landowner or operator who receives an adverse jurisdictional determination should seek and either obtain or be denied a CWA permit, and then should challenge agency jurisdiction to make that permit decision. But a permit challenge is a manifestly unfair burden to place on the shoulders of a person who contends that the permit process is unnecessary in the first place because the federal government lacks CWA jurisdiction.

In arguing otherwise, the government pretends that the permit application process under the CWA

is simple, quick, and economical. This Court knows better.

In *Solid Waste Agency of Northern Cook County*, 531 U.S. 159, this Court held that the Corps had improperly asserted jurisdiction over isolated ponds located on an abandoned strip mine on which a coalition of 23 municipalities, representing 700,000 residents, planned to construct a balefill as part of a comprehensive regional effort to address solid waste disposal. SWANCC obtained all necessary Illinois and local government permits approving the balefill. But after the Corps made an affirmative jurisdictional determination in November 1987, SWANCC sought a federal permit to proceed with the project.

The complexities of compiling the permit application meant that SWANCC's application was not filed until February 1990. After the Corps denied the permit, SWANCC was forced to file an amended application, which was denied again by the Corps in July 1994. The Corps' record in the permit proceedings was 47,000 pages long, reflecting what the government conceded was "a very complex inquiry." Tr. of Oral Argument at 18, 40-41, 43, *SWANCC* v. *U.S. Army Corps*, 531 U.S. 159 (2001) (No. 99-1178). Nearly seven years of litigation ensued before this Court held that the Corps' jurisdictional determination had been unlawful from the start. Ultimately, the 14-year delay and tens of millions of dollars in costs that resulted from the Corps' illegal jurisdictional determination doomed the municipalities' balefill project, which was never built. See Thomas W. Merrill, *The Story of SWANCC*, in ENVIRONMENTAL LAW STORIES 283 (Richard Lazarus ed., 2005).

SWANCC is no outlier case. The Corps' rules for evaluating individual permit applications ensure that the individual permit process for a project of *any* size will be time-consuming and expensive. To obtain a permit under the CWA, an applicant must first secure a certificate from the State that the proposed discharge will comply with state water quality standards. 33 U.S.C. § 1341; 33 C.F.R. § 320.4(d). The Corps then makes its own independent determination whether to grant a permit and what conditions to impose, based on its "evaluation of the probable impacts * * * of the proposed activity and its intended use on the public interest." 33 C.F.R. § 320.4(a). That inquiry involves the Corps' "weighing * * * all those factors which become relevant in each particular case." *Ibid.*

That vague "all factors" standard requires applicants to hire consultants to address every facet of the "public interest": a term which the Corps says encompasses "conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, flood plain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership, and, in general, the needs and welfare of the people." 33 C.F.R. §320.4(a)(1).[6] The Corps even evaluates "the relative extent of the public and private need for the proposed structure or work" (*id.*,

---

[6] A CWA permitting requirement may also trigger the need to complete a National Environmental Policy Act environmental review (such as an environmental assessment or environmental impact statement) and an Endangered Species Act Section 7 consultation, adding additional uncertainty, delay and cost.

§320.4(a)(2)(i))—an inquiry which invites the Corps to substitute its own views of the social value of a project for those of state and local authorities that have already approved it. *But see, e.g.*, *FERC* v. *Mississippi*, 456 U.S. 742, 768 n.30 (1982) (land use planning "is perhaps the quintessential state activity").

The Corps' open-ended standards mean that it can take months or even years for a landowner or operator simply to *put together* a permit application —delays the government tellingly excludes from its own assessment of the burdens of the permit process. See Pet. Br. 47 n.10.[7] And that says nothing of the months or years longer that it takes to receive a permit decision (timing within the sole control of the Corps), or the commonplace occurrence that the initial permit application is rejected and the applicant has to go through the entire process again with a revised application, as happened in *SWANCC*.

Unbowed, the government takes the position that the CWA makes the permit process the "primary avenue of obtaining judicial review of a jurisdictional determination," which reflects a congressional judgment that should not be "second-guessed." Pet. Br. 45-46. That claim misses the point. The question here is whether the avenue for judicial review provided as part of the CWA is "adequate" within the meaning of the separate statutory provisions of the APA. What Congress intended under the CWA does not shed light on what it intended under the APA.

---

[7] The specific burdens of the permit application process are detailed at Brief Am. Cur. of the American Farm Bureau Fed'n, *et al.*, *Sackett* v. *EPA*, No. 10-1062, at 23-34 (Sept. 2011), https://perma.cc/59RF-YX3W.

That is especially so because "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into voluntary compliance without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction." *Sackett*, 132 S. Ct. at 1374 (quotation marks omitted).

The government itself appears to recognize that the CWA's delayed judicial remedies are inadequate as a practical matter. The necessary conclusion underlying the Corps' decision to create the jurisdictional determination regime in the first place is that it would be unfair to force parties to obtain and then challenge permits, just to obtain rulings on the agencies' jurisdiction. And before this Court, the government freely acknowledges that it is "understandable [why] persons in respondents' position would prefer a pre-permit, pre-discharge judicial ruling on the CWA coverage issue." Pet. Br. 50.

b. The government's second suggested alternative to immediate judicial review—that a landowner or operator should simply proceed with development or other use of the land without a permit and then raise the issue of jurisdiction in the ensuing enforcement proceeding—is even more impractical. See *Sackett*, 132 S. Ct. at 1374 (rejecting the Corps' argument that the Sacketts had to await enforcement proceedings to "challenge * * * the EPA's authority to regulate their land under the Clean Water Act") (Ginsburg, J., concurring).

First, EPA's and the Corps' definitions of "waters of the United States" are vague and uncertain. They make it impossible to be sure, in many cases, whether a feature—which may be ephemeral or his-

toric and not observable, or only very distantly and indirectly linked with any navigable water—will be treated by the Corps as a water of the United States. That leaves "regulated entities * * * to feel their way on a case-by-case basis." *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).[8]

Second, if land is subject to CWA jurisdiction, most activity on the land risks being characterized by the Corps as a violation. The Corps' conception of activity that involves an "addition" of pollutants that violates the Act if done without a permit is extraordinarily expansive. Even "[a]ctivities such as walking, bicycling or driving a vehicle through a wetland" might "'degrade'" the wetland "within the meaning of [the Corps'] rule." 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993). Although the Corps will exercise its discretion not to regulate these types of activity so long as it concludes their adverse effects are "de minimis" (who knows what that means?), it has emphasized that "the threshold of adverse effects for the de minimis exception is a very low one" and that much less than a significant impairment or degradation of a wetland will be a violation of the Act. *Ibid.* Most landowners and operators, contem-

---

[8] EPA and the Corps issued a regulation in July 2015 purporting to "clarify" the meaning of "waters of the United States." 80 Fed. Reg. 37,054, 37,055 (June 29, 2015). *Amici* have challenged the agencies' June 2015 rule, in part on grounds that it violates the Fifth Amendment's prohibition on vague criminal laws. See *American Farm Bureau Federation, et al.* v. *U.S. EPA*, No. 3:15-cv-165 (S.D. Tex. July 2, 2015); *American Farm Bureau Federation, et al.* v. *U.S. EPA*, No. 15-3850 (6th Cir. Aug. 6, 2015). Implementation of the rule was stayed nationwide by the Sixth Circuit. See Pet. Br. 16 n.5.

plating the risks, will simply refrain from any productive use of the land at all.

Third, the costs of an easily-made mistake—of not recognizing that the Corps would claim that a particular feature is a "water of the United States," or of engaging in some otherwise innocent activity on that land that the Corps might treat as an impermissible discharge—can be crippling. Civil penalties are $37,500 *per day per violation*. And a single day's activities may be treated by the Corps as involving multiple violations. In one case, the Ninth Circuit upheld EPA's imposition of separate CWA penalties for each of 348 passes of a deep plow through swales and seasonal drainages covering just 2 acres of a 8,400 acre farm and ranch, resulting in a total penalty of $1.5 million. *Borden Ranch P'ship* v. *U.S. Army Corps of Eng'rs*, 261 F.3d 810, 813 (9th Cir. 2001), aff'd by an equally divided Court, 537 U.S. 99 (2002). See also Br. for Petitioner at 15, 46-50, *Borden Ranch P'ship* v. *U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002) (No. 01-1243).

Civil penalties are not the only risk—the CWA authorizes criminal sanctions as well. A knowing criminal violation carries fines of up to $100,000 per day and six years imprisonment. 33 U.S.C. § 1319-(c)(2). Even a *negligent* violation can bring heavy fines and two years in prison. See p.4 n.1, *supra*.

Given the dire consequences of violating the Act, the government's blithe assertion (Pet. Br. 16) that a landowner or operator "may discharge without a permit if it is sufficiently confident" of the law and the facts is frankly absurd. Given the intentional vagueness of the agencies' regulations, the breadth of discretion claimed by the Corps, and the uncertain legal rules governing this area, it is the rare land-

owner or operator that would ever feel truly confident in its (or its consultants') assessment that the property contains no waters of the United States. And aside from that, few rational decision-makers would be willing to accept *any* risk of an adverse judgment, no matter the level of their confidence, in the face of crippling fines and jail time.

3. Judicial review of jurisdictional determinations will conserve party and agency resources and further the development of the law

The government makes its own practical argument against allowing immediate judicial review. It points to the large number of jurisdictional determinations issued each year and contends that allowing judicial review will require the Corps to litigate the validity of each one, "impos[ing] a substantial further strain on the Corps' limited resources." Pet. Br. 24. That prediction might be troubling if there were anything to it. But there is not.

Allowing landowners and operators to challenge jurisdictional determinations immediately would not open the floodgates of litigation in the way the government suggests. In those "easy" cases where the Corps' jurisdictional determination rests on sound analysis, those subject to the determination are much more likely to seek a permit, offer mitigation, and cooperate with the Corps than to pursue costly litigation that will cause delay and that is unlikely to be fruitful. And when a project fits within a nationwide or other general permit—which cover many types of small projects—a landowner or operator will usually choose to comply with the general permit as the most economical and efficient course, rather than litigate jurisdiction.

The only cases in which the lower court's rule would actually introduce or accelerate litigation is when a landowner seeks an individual permit to discharge and the Corps' claim of jurisdiction is sufficiently dubious, and the costs and delay involved in permitting are large enough, to warrant the burden of litigating against the United States government. Such cases will be few and far between. And litigation in *those* cases will have significant *benefits*: it will lead to much-needed judicial guidance on the scope of CWA jurisdiction, which will assist regulators and the regulated alike. Cf. *Fairbanks N. Star Borough* v. *U.S. Army Corps of Eng'rs*, 543 F.3d 586, 594 (9th Cir. 2008) (courts must "have the final say on the scope of the CWA"). Judicial testing of the Corps' more aggressive assertions of jurisdiction at an early stage will delineate more clearly for all concerned which waters truly are "waters of the United States." Such clarity is good for everyone, including the petitioner here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

MICHAEL B. KIMBERLY
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

TIMOTHY S. BISHOP
Counsel of Record
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60603
(312) 781-0600
tbishop@mayerbrown.com

ELLEN STEEN
DANIELLE HALLCOM QUIST
American Farm Bureau Federation
600 Maryland Ave SW
Washington, DC 20024
(202) 406-3600

MICHAEL E. KENNEDY
Associated General Contractors of America
2300 Wilson Boulevard
Suite 300
Arlington, VA 22201
(703) 837-5335

LINDA E. KELLY
QUENTIN RIEGEL
Manufacturers' Center For Legal Action
733 10th Street NW
Suite 700
Washington, DC 20001
(202) 637-3000

SCOTT YAGER
National Cattlemen's Beef Association
1301 Pennsylvania Ave NW, Suite 300
Washington, DC 20004
(202) 879-9102

Counsel for Amici Curiae

MARCH 2016